



# Wisconsin Elections Commission

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December 6, 2021

Gary Mertig  
82183 Cty. Rd. F  
Butternut, WI 54514

Barbara Koch, School Board Clerk  
Butternut School District  
15910 Wagner-Vogt Board  
Butternut, WI 54514

**Sent via email to:** [mertiga@centurytel.net](mailto:mertiga@centurytel.net) [bkoch@lightatorch.info](mailto:bkoch@lightatorch.info)

**Re: In the Matter of: Mertig v. Koch (Case No.: EL 21-42)  
Appeal of Decision of Barbara Koch, Butternut School Board Clerk**

Dear Mr. Mertig and Clerk Koch:

This decision letter is in response to the verified complaint submitted by Gary Mertig against Barbara Koch, Clerk of the Butternut School District with the Wisconsin Elections Commission (“Commission”), appealing the determination of sufficiency of a recall petition. The complaint requests that the Commission review the recall petitions submitted and find that the number of signatures submitted is below the number required to require a recall election against him. The complaint alleges that some individuals were not residents of the Butternut School District and that the circulator that signed the recall petition was not the individual that actually circulated the petition.

In short, the Commission finds that the decision of the School District Clerk, determining sufficiency of the recall petition was proper. The Clerk properly conducted a facial review of the petitions and issued her decision. No timely, sworn, written complaint challenging signatures on the recall petitions was submitted to the Clerk by Mr. Mertig for her consideration. Based on the presumption of validity attached to signatures submitted on a petition, and Mr. Mertig’s failure to provide evidence to the Clerk to overcome that presumption at the time of the review, the Clerk’s decision finding sufficiency was proper.

## Procedural Posture

A Statement of Intent to Circulate Recall Petition for Gary Mertig – Butternut School Board President was filed with the School Board Clerk on September 8, 2021. On October 22, 2021, 15 recall petition pages containing 133 were submitted to the Clerk. Based upon the calculation made under Wis. Stat. § 9.10(1)(b), 126 signatures were required to certify the petitions and order a recall election. On October 29, 2021, the Clerk met with Mr. Mertig to discuss the petitions that had been filed. The subject of the recall has 10 days after the petition is filed to file a written challenge with the Clerk. The deadline for Mr. Mertig to file a written challenge with

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*Administrator*  
Meagan Wolfe

the Clerk was November 1, 2021. No written challenge was filed by the deadline. Mr. Mertig provided the Clerk with a letter on November 3, 2021, informing the Clerk that he was challenging signatures on the recall petition. The Clerk issued a Letter of Sufficiency to Mr. Mertig on November 3, 2021, finding 130 valid signatures which is more than the 126 required. Based on the finding of sufficiency, a recall election was scheduled for December 14, 2021.

On November 11, 2021, Mr. Mertig filed a verified complaint with the Commission under Wis. Stat. § 5.06(1), appealing the Clerk's sufficiency determination. Unfamiliar with the Section 5.06 appeal process that was underway with the Commission, the Clerk sent a Letter of Insufficiency to Mr. Mertig on November 26, 2021. After a conversation with WEC staff on the complaint/response process, the Clerk filed a verified response to the Complaint on November 29, 2021. Mr. Mertig filed a reply via email on November 29, 2021.

### Commission Authority and Role in Resolving Complaints Filed Under Wis. Stat. § 5.06

Under Wis. Stat. §§ 5.05(1)(e) and 5.06(6), the Commission is provided with the inherent, general, and specific authority to consider the submissions of the parties to a complaint and to issue findings. In instances where no material facts appear to be in dispute, the Commission may summarily issue a decision and provide that decision to the affected parties. This letter serves as the Commission's final decision regarding the issues raised by Mr. Mertig's.

### Commission Findings and Decision

The Commission's role in resolving verified complaints filed under Wis. Stat. § 5.06, which challenge the decisions or actions of local election officials, is to determine whether a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

This decision is primarily based on procedural requirements/due process, the presumption of validity that attaches to petitions/signatures, the burden of proof required to overcome that presumption and whether the Clerk's examination of evidence available to her at the time of her decision was consistent with applicable election laws and administrative code provisions governing the review of recall petitions.

Any information which appears on a recall petition is entitled to a presumption of validity. Wis. Admn. Code EL §§ 2.05(4), 2.09(1). The school board clerk must determine if the submitted recall petition was prepared, circulated, and submitted in accordance with Wis. Stat. §§ 8.40, 9.10(2) and Wis. Admn. Code EL §§ 2.05, 2.07, 2.09 and 2.11. By administrative rule, the sufficiency standards for nomination papers outlined in Wis. Admn. Code EL § 2.05 apply to the review and determination of sufficiency recall petitions. Wis. Admn. Code EL § 2.09(1), (5).

The officer in which a recall petition has been filed has 10 days to file a written challenge with the school district clerk. Wis. Stat. § 9.10(4)(a). The filing officer or agency shall review a verified challenge to a recall petition if it is made prior to certification. Wis. Stat. § 9.10(2)(f), (4)(a). The burden of proof for any challenge rests with the individuals bringing the challenge. Wis. Stat. § 9.10(2)(g). Any challenge to the sufficiency of the petition must demonstrate by affidavit or other supporting evidence a failure to comply with statutory requirements. Wis. Stat. § 9.10(2)(h).

A written challenge provides the opportunity for the recall petitioner to file a written rebuttal within 5 days of the challenge. Wis. Stat. § 9.10(4)(a). If a rebuttal has been filed, the officer in which the recall petition has been filed against is allowed an additional 2 days to address any new issues raised in the rebuttal. Id. Mr. Mertig sent a letter to the Clerk 2 days after the challenge deadline, and the

letter only indicated it was challenging certain signatures without evidence to support such assertions. The challenge process is important to affording the parties due process and the opportunity to challenge, respond to a challenge and correct signatures and pages that could be corrected based on the allegations raised in the challenge. Without a timely written challenge, the Clerk was left with conducting her facial review of the petitions that were filed. The Clerk's response to the complaint outlines the process she used to conduct this review as required by Wis. Admn. Code EL §§ 2.05(3), 2.09(5). After her review, the Clerk struck 3 signatures and determined that 130 signatures were valid, which exceeded the 126 needed to require a recall election.

Mr. Mertig provides the Commission new evidence now on his Section 5.06 appeal to support his claims that not enough valid signatures were submitted to the Clerk to require the recall. The issue is that had such information been provided to clerk through a valid, timely challenge, the Petitioner would have had the opportunity to correct potential errors raised by the challenge as allowed by Wis. Stat. § 9.10(4). The Commission reviews the decision of the Clerk, based on the information the Clerk had available when making that decision. The Clerk, nor the Recall Petitioner, had the opportunity to review the information now provided in the appeal. Accepting new evidence now, bypasses the important initial challenge process that affords all parties due process and the opportunity to correct errors on the petitions before a decision is issued.

The Commission finds that Barbara Koch, Butternut School Board Clerk properly reviewed the recall petitions filed against Gary Mertig and properly issued a Determination of Sufficiency as required by Wis. Stat. § 9.10(4). The recall election called for December 14, 2021, shall proceed as scheduled.

#### Right to Appeal – Circuit Court

This letter constitutes the Commission's resolution of this complaint. Wis. Stat. § 5.06(2). Pursuant to Wis. Stat. § 5.06(8), any aggrieved party may appeal this decision to circuit court no later than 30 days after the issuance of this decision.

If any of the parties should have questions about this letter or the Commission's decision, please feel free to contact me.

Sincerely,

COMMISSION

A handwritten signature in black ink that reads "Megan L.M. Wolfe". The signature is written in a cursive style with a large, looped 'M' at the beginning.

Meagan Wolfe  
Administrator

cc: Commission Members